# Head of Terms Agreement

# Dated \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ 2021

# Between

# [\*]

# (as the “Seller”)

# 

# - & -

# [\*]

# (as the “Purchaser”)

# - relating to –

# The Proposed Sale of Business and Assets/sale and purchase of [\*….\*]

# Drawn By:

****

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2nd Ngong Avenue, Community

P. O. Box 7879-00200

**Nairobi.**

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**Head Of Terms Agreement**

**Proposed Sale of Business and Assets/sale and purchase of [\*…\*]**

1. **Seller:**

**(i) [\*], (ii) [\*],** and **(iii) [\*]** (being the current shareholder of the total issued share capital of the company referred to as [\*] of Registration Number [\*] (the **Company**)) of P. O. Box [\*].

1. **Purchaser:**

**[\*]**, a company incorporated in the republic of Kenya of registration number [\*], in the care of P. O. Box [\*].

(The Seller and Purchaser shall collectively be referred to as the “**Parties**” and the term “**Party**” shall refer to one of them as the context may indicate.)

1. **Introduction**
   1. The Parties are in discussions on the proposed sale of the business and assets the Company by way of sell and transfer of shares in the Company held by the Sellers to the Purchaser (the **Proposed Transaction**).
   2. These Heads of Terms set out the main terms and conditions on and subject to which the Seller is willing, in principle, to sell and transfer the business and assets of the Company by way of sale of the entire issued share capital of the Company (**Shares**) to the Purchaser subject to the agreement and signature by the parties of a legally binding Share Purchase Agreement.
   3. These Heads of Terms are not exhaustive nor are they intended to be legally binding between the Seller and the Purchaser, except where specifically provided to the contrary below.
   4. In this Agreement the following words and expression will have the following meaning:
      1. “**Assets**” means such plant, machinery and equipment of the Company;
      2. **“Business”** means the business of [\*] currently being operated and undertaken by Company including its assets and liabilities;
      3. “**Company**” means [\*], a private limited liability company duly incorporated and constituted under the Companies Act of Kenya of Registration Number [\*], with its registered office in the Republic of Kenya,of P. O. Box [\*];
      4. “**Completion**” means the date of transfer of ownership of the Company from the Seller to the Purchaser;
      5. “**Completion Date**” means the date as set out in paragraph 11 of these head of terms or such other date as may be agreed in writing;
      6. “**Employees**” mean the employees of the company as at the Completion Date;
      7. **“Price”** means the agreed purchase price as set out in paragraph 6 of these Heads of Terms;
      8. “**Shares**” means the entire authorized share capital of the Company, being Kenya Shillings [\*] (KES [\*]) divided into [\*] ordinary shares of Kenya Shillings [\*] (KES [\*]) each;
      9. **“Share Purchase Agreement”** means the agreement referred to in paragraph 9 herein;
      10. **“Purchaser’s Advocates”** means [\*]
      11. **“Seller’ Advocates”** means [\*];
   5. **Interpretation**

In this Agreement, unless the context otherwise requires, any reference to:

* + 1. the singular includes the plural and vice versa;
    2. a person includes reference to a body corporate or other legal entity;
    3. any written law includes that law as amended or re-enacted from time to time;
    4. any agreement or other document includes that agreement or other document as varied or replaced by the Parties in writing from time to time;
    5. a clause is to the relevant clause of this Agreement; and
    6. any Party includes that Party’s successors and assigns.
  1. The descriptive headings contained in this Agreement are included for convenience of reference only and shall not affect in any way the meaning or interpretation of this Agreement.

1. **Nature of Proposed Transaction**
   1. It is proposed that the Seller shall sell and the Purchaser shall buy the business and assets of the Company by way of sale of the Shares, free from all claims, liens, equities, charges, encumbrances and adverse rights of any description.
   2. The Business together with its control and management will be acquired as a going concern basis on the Completion Date.
   3. The Company shall be sold by the Seller and acquired by the Purchaser as a going concern on an “as is” “walk-in walk-out” basis.
   4. The Seller shall discharge and pay for all its liabilities and obligations in respect of the Company as they become due up to the Completion Date.
   5. The Seller shall be entitled to all Receivables and incomes due but not paid to the Company at the Completion Date. The Purchaser shall pay these Receivables to the Seller as they are received.
   6. For the avoidance of doubt, save for this paragraph 4, the Seller shall not be liable for any liabilities of the Company after the Completion date. and will not be entitled to any Receivables of the Company after the Completion date.
   7. The transfer of the Share shall be done only after the full payment of the Price on the Completion Date and payment of the capital gain tax.
   8. As part of the due diligence exercise and regulatory compliance requirements, the Purchaser shall disclose to the Seller;
      1. details of its shareholders and directors;
      2. the confirmation of the source of the funds for the Price, and bank verification of the same; and
      3. the details of its ultimate beneficiaries of the Purchaser
2. **Shares to be Purchased**
   1. The Seller proposes to sell the full legal and beneficial interest in the Shares, free from all claims, liens, equities, charges, encumbrances and adverse rights of any description
   2. The Shares are legally and beneficially owned by the Seller.
   3. The Company’s subsidiaries and related companies , present and past , are as follows;
      1. [\*];
3. **Price** 
   1. The parties have mutually agreed that the valuation of the Shares to be [**Kenya Shillings/United States Dollars [\*]] (Price)** after full satisfaction and consideration of the operations of the Company’s business.
   2. The Price may be varied pursuant to the findings of the due diligence exercise undertaken by the Purchaser.
   3. The Price shall be paid in full upon the completion of the Proposed Transaction;
   4. The Seller shall bear and pay the capital gain tax on the Proposed Transaction from the proceeds of the Price;
4. **Conditions Precedent**
   1. The Proposed Transaction is conditional on the following matters:

### the Purchaser conducting, and being satisfied with the results of, legal, financial, taxation and commercial due diligence concerning the Company and its business, assets and liabilities and any other matters the Purchaser considers necessary;

### the parties agreeing, signing and exchanging a detailed and legally binding share purchase agreement incorporating all the terms of the Proposed Transaction (Share Purchase Agreement), including (without limitation) the matters set out in paragraph 9;

### any third party, regulatory or tax consents or approvals necessary or desirable for the Proposed Transaction being received on terms satisfactory to the Purchaser;

### the Purchaser being satisfied with the disclosure letter produced by the Seller in respect of the warranties outlined in the Share Purchase Agreement;

### there being no material adverse change in the business, operations, assets, position (financial, trading or otherwise), profits or prospects of the Company between the date of this Agreement and Completion;

### no contract, licence or financial agreement that is material to the business of the Company being terminated or amended in any materially adverse respect between the date of this Agreement and Completion;

### the resignation of any current directors of the Company from their positions as directors of the Company with effect from Completion (subject to any ongoing commitments detailed in the Share Purchase Agreement and subject to the provision of paragraph 9.5), without compensation for loss of office or otherwise; and

### the Seller providing the Purchaser with management accounts for the Company in respect of the period from the last annual accounts up to Completion, and such accounts being satisfactory to the Purchaser.

1. **Due Diligence**
   1. As soon as reasonably practicable after the signing of this Agreement, the Purchaser will carry out a due diligence investigation of the Company, including its legal, accounting, financial, commercial and taxation affairs.
   2. The Seller will, so far as is reasonably practicable (and subject always to the remaining provisions of this paragraph 8):

### provide the Purchaser (and any agents and advisers) with full access to such records, key employees, advisers and operations of the Company as required to enable the Purchaser to complete their due diligence investigation;

### provide, or make available to the Purchaser (and agents and advisers) such information relating to the Company as the Purchaser may reasonably require in order to evaluate and assess the Company and the business, assets and liabilities in connection with the Proposed Transaction; and

### respond to all due diligence enquiries raised by or on behalf of the Purchaser for the purpose of the Proposed Transaction in a comprehensive, accurate and timely manner.

1. **Share Purchase Agreement**
   1. As soon as reasonably practicable following the due diligence investigation of the Company, the Purchaser and the Seller will commence negotiation of a definitive Share Purchase Agreement, the initial draft of which will be prepared by the Seller’s lawyers.
   2. The Share Purchase Agreement will include (without limitation) the terms summarised in this paragraph 9, together with such other terms, conditions, warranties, covenants and indemnities as are appropriate to a transaction in the nature of the Proposed Transaction.
   3. The Seller will provide the Purchaser with customary warranties and representations appropriate to the Proposed Transaction relating to the Company and its business, assets and liabilities in terms to be agreed by the parties (Transaction Warranties).
   4. The Seller’s liability under the Transaction Warranties will be subject to customary limitations appropriate to the Proposed Transaction, in terms to be agreed by the Parties.
   5. The Share Purchase Agreement will include non-compete, non-dealing and non-solicitation undertakings given by the Seller in a form acceptable to the Purchaser, including (without limitation) undertakings not to:

### compete, or have any involvement in a business that competes, with the business of the Company, at any time during the period of one (1) year following Completion;

### offer employment to, enter into a contract for the services of, or solicit or otherwise attempt to entice away, any employee of the Company, at any time during the period of one (1) year following Completion;

### deal with, or seek the customers of, any customers of the Company, at any time during the period of one (1) year following Completion;

### deal with, solicit or entice away, any suppliers of the Company during the period of one (1) year following Completion; or

### at any time during the period of one (1) year following Completion, induce or attempt to induce any customer or supplier to cease or refrain from conducting business with, or to reduce the amount of business conducted with or to vary adversely the terms upon which it conducts business with the Company, or do any other thing which is reasonably likely to have such an effect.

* 1. The business and activities of the Company will be carried on in the ordinary course with a view to preserving the goodwill of the one (1) year prior to Completion.

1. **Handover**
   1. For a period of twelve (12) month following the Completion Date (**Handover Period**) the Seller shall commit to a handover process to help ensure that the business of the Company continues uninterrupted over this period.
   2. Without prejudice to the generality of paragraph 10.1 above, the Seller undertakes to the Purchaser that during the Handover Period;

### [\*].

1. **Timetable and Completion**
   1. The Purchaser intends to proceed as quickly as possible with the Proposed Transaction. The Seller and the Purchaser will negotiate in good faith with a view to signing and exchanging the Share Purchase Agreement and completing within a maximum period of six (6) months from the date of signing this Agreement (**Completion Date**).
   2. The Seller and the Purchaser agree and acknowledge that these Heads of Terms are not intended to, nor do they create, a legally binding obligation to proceed with the Proposed Transaction and no such obligation will arise unless and until a Share Purchase Agreement is agreed, signed and exchanged by the parties.
2. **Employees**
   1. The Seller shall discharge all its obligations in respect of its employees up to the Completion Date and shall indemnify the Purchaser against any liability relating to its employees which arise put of any act or omission by the Seller or any other event, matter or circumstance occurring before the Completion Date.
3. **[Company Assets**
   1. The Assets shall be divided and allocated as follows:]
4. **Insurance**
   1. The Seller has in place group insurance cover over the assets of the Company and shall continue to insure, and keep insured, the business and the assets of the Company against all risks including, without limitation, destruction or damage by fire for their full replacement value with a reputable insurance company up to and until the Completion Date.
   2. The Seller shall promptly and timeously pay all insurance premiums up to and until the Completion date and on demand produce to the Purchaser policies of such insurances and proof of such payments.
   3. Upon default by the Seller in effecting such insurance or in producing the said policies or receipts the Purchaser may insure the assets and the amount so expended shall be offset from the Purchase Price or be recoverable by action.
5. **Exclusivity**
   1. The following definitions shall apply in this Clause 15:

### Restricted Activity: means each and any of the following:

#### any investment in the Company;

#### the disposal (whether by way of sale, offer, transfer or otherwise) of all or any part of, or any interest in, the issued share capital of the Company; or

#### the disposal (whether by way of sale, offer, transfer or otherwise) of all, or a material part of, the business or assets of the Company (other than in the ordinary course of trading).

### Third Party: means any person other than the Purchaser.

### Third Party Negotiations: means any discussions or negotiations between a Third Party and the Seller, a member of the Seller's group or any of its officers, employees, agents or advisers, relating to or otherwise concerning a Restricted Activity.

* 1. The Seller agrees that for the subsistence of this Agreement, it will discuss and negotiate with the Purchaser on an exclusive basis in relation to the Proposed Transaction.
  2. The Seller undertakes that during the subsistence of this Agreement, it will not directly or indirectly:

### continue, enter into, re-start, solicit, initiate or participate in any Third-Party Negotiations;

### induce, solicit, seek, encourage or respond to any approach that might lead to Third Party Negotiations;

### solicit or encourage any offer from a Third Party in relation to a Restricted Activity;

### enter into any agreement, arrangement or understanding (whether or not legally binding) with a Third Party in connection with a Restricted Activity; or

### supply, disclose or otherwise make available any information about the Company, its business assets or liabilities to a Third Party for the purpose of evaluating, or deciding whether to pursue or make an offer in connection with, a Restricted Activity.

* 1. On signing this Agreement, the Seller will immediately terminate, or procure the termination of, any Third-Party Negotiations currently taking place.
  2. The Seller will promptly notify the Purchaser in writing if it receives an offer (whether written or oral), indication of interest, proposal or enquiry from a Third Party concerning a Restricted Activity.

1. **Confidentiality**
   1. The content of this Agreement is confidential to the parties and is subject to the mutual Non-Disclosure and Non-Circumvention Agreement made between the Seller and the Purchaser, which agreement is not affected by the terms herein and continues in full force and effect.
2. **Costs**
   1. The parties will pay their own costs and expenses incurred in connection with the Proposed Transaction whether or not it proceeds, including (without limitation) any costs and expenses relating to the preparation and negotiation of these terms and any other documents contemplated by them.
3. **Governing Law and Jurisdiction**
   1. Any dispute or claim arising out of or in connection with this Agreement or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the laws of the Republic of Kenya.
   2. The Parties agree that should a dispute arise with respect to this Agreement, they shall make good faith efforts to resolve the dispute within fifteen (15) days on a business basis through negotiation between the parties.
   3. If the negotiations fail to resolve the dispute as above then the Parties agree to terminate the negotiations and will not proceed with the Proposed Transaction.
4. **General Provisions**
   1. Unless otherwise required by another provision herein, any notice given to a party hereto shall be deemed properly given if specifically acknowledged by the other party or when delivered to the other party by registered mail to the address indicated above.
   2. Neither party may not assign, or otherwise transfer, its rights or delegate its duties or obligations under this Agreement. Any attempt to assign or otherwise make such transfer without obtaining such consent shall be void.
   3. No failure or delay by any party in exercising any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any right, power or privilege hereunder.

**In Witness Whereof**, the parties hereto have executed this Agreement the date first herein above written.

|  |  |
| --- | --- |
| **Signed** by **[\*]**  in the presence of: -  **Advocate** |  |

or (in the case of a company)

|  |  |
| --- | --- |
| **Signed** by the dully authorized officials of  **[\*]**  in the presence of: -  **Advocate** | .........................................................  ......................................................... |

**Drawn by:-**

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